

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 18-06-2007

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

Second Appeal No.1439 of 1996

1.Marappa Gounder
2.Lakshmi
3.Sarasayammal

.. Appellants.

Versus

1.Natarajan
2.Rasammal

.. Respondents.

Appeal against the judgment and decree of the Court of Subordinate Judge, Bhavani, in A.S.No.7 of 1996, dated 26.03.1996, preferred against the judgment and decree of the Court of the District Munsif, Bhavani, in O.S.No.82 of 1985, dated 31.01.1994.

For Appellants : Mr.A.K.Kumaraswamy

For Respondents : Mr.T.Murugamanickam

J U D G E M E N T

The Second appeal has been filed against the judgment and decree of the Court of Subordinate Judge, Bhavani, dated 26.03.1996, made in A.S.No.7 of 1996, reversing the judgment and decree of the Court of the District Munsif, Bhavani, dated 31.01.1994, made in O.S.No.82 of 1985.

2. The appellants in the present second appeal were the defendants 1, 4 and 5 in the suit. The plaintiffs had filed the suit in O.S.No.82 of 1985, on the file of the Court of the District Munsif, Bhavani, praying for a decree declaring that the suit cart track is specifically intended to be used only for the purpose of reaching S.F.Nos.224, 225 and 226/A of Jambai village by the plaintiffs and the first defendant alone and for the grant of permanent injunction, restraining the defendants, their men, assigns and heirs from in any manner using the suit

cart track pathway to reach their lands in the suit property, which had been acquired subsequently.

3. The brief facts of the case as stated by the plaintiffs are as follows:

The first plaintiff is the father of the second plaintiff. The first plaintiff is the son of one Chinna Gounder and the first defendant is the son of one Muthu Gounder. Muthu Gounder and Chinna Gounder are brothers. When the joint family properties belonging to the Hindu Joint family consisting of the plaintiffs and the defendants were partitioned by a registered deed, dated 12.12.1930, the suit cart track pathway, which is in the northern part of S.F.No.226-A of Jambai Village, had been left in common for the specific purpose of reaching S.F.Nos.224, 225 and 226/A. According to the plaintiffs the suit cart track cannot be used to reach any other lands, excepting the lands covered under the partition deed, dated 12.12.1930. While the plaintiffs are reaching their respective lands through the suit cart track, the defendants are attempting to use the suit cart track as a pathway to reach their lands acquired by them subsequent to the partition deed, dated 12.12.1930, even though they have no right to do so. Therefore, the plaintiffs were constrained to file the suit in O.S.No.82 of 1985, on the file of the Court of the District Munsif, Bhavani.

4. In the written statement filed by the first defendant for himself and on behalf of the second defendant, it has been stated that the plaintiffs have no cause of action to institute the suit and that the suit is vexatious and frivolous and liable to be dismissed in limine. It has been stated that the second defendant is an unnecessary party to the suit, since she has no title or interest in the suit property. Further, it is stated that the suit cart track and the pathway rights have been provided in the sale deeds executed by the vendors of the suit properties. Since the first defendant had purchased the adjoining portions of the properties, he has easementary rights to use the cart track and pathway to reach the said lands. Since the suit cart track is a common cart track meant for the use of both the plaintiffs and the defendants, under the partition deed, dated 12.12.1930, the plaintiffs cannot have any valid objections against the use of the suit cart track pathway by the first defendant.

5. Based on the averments made on behalf of the plaintiffs and the defendants, the trial Court had framed the following issues for consideration:

- i) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for in the suit?
- ii) What other reliefs the plaintiffs are

entitled to?

6. It has been contended on behalf of the plaintiffs that the cart track pathway was meant for the use of carts, cattle and persons connected to the plaintiffs and the defendants alone and that it was clear that the said cart track was meant to be used by the defendants and their people, only to have access to the portions of the properties, which had been allotted to them under the partition deed, dated 12.12.1930. However, the defendants had contended that the cart track described in Ex.A-6, dated 12.12.1930, was meant to be used by the defendants and others to have access also to other properties belonging to them. Accepting the contentions of the defendants, the trial Court had dismissed the suit, holding that the suit cart track pathway, as mentioned in Exhibit A-6, which is a partition deed, dated 12.12.1930, could be used both by the plaintiffs as well as the defendants, in common and that it could also be used by the defendants to have access to the lands other than those in S.Nos.224, 225 and 226-A.

7. Aggrieved by the judgment and decree of the trial Court, dated 31.01.1994, made in O.S.No.82 of 1985, the second plaintiff had filed an appeal in A.S.No.7 of 1996, on the file of the Sub Court, Bhavani.

8. Based on the rival contentions and taking into consideration the evidence available on record, the lower Appellate Court had framed the following points for consideration:

i) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for in the suit?

ii) Such other reliefs, the plaintiffs are entitled to?

9. The lower Appellate Court had found that there was no dispute with regard to the fact that the suit cart track pathway in question is lying in S.Nos.224, 225, 226/A. It was also not in dispute that the said cart track was to be enjoyed by both the plaintiffs and the defendants in common. The lower Appellate Court had found that the suit cart track, as described in Ex.A-6, was intended to be used by the defendants, only to have access to the properties, which had fallen to their share as per the partition deed. Therefore, the lower Appellate Court had held that the reliefs prayed for by the plaintiffs was to be granted. Therefore, the lower Appellate Court had reversed the findings of the trial Court and had decreed the suit as prayed for, by its judgment and decree, dated 26.03.1996.

10.

10. Aggrieved by the judgment and decree of the lower Appellate Court, dated 26.03.1996, the present second appeal has been preferred by the defendants 1, 4 and 5, who were the respondents 1, 3 and 4 in the first appeal before the lower Appellate Court.

11. The second appeal had been admitted on the following substantial questions of law:

1. Whether the interpretation placed on the recitals in Ex.A-6 partition deed by the lower Appellate Court is legally sustainable?

2. Whether the lower Appellate Court is justified in holding that the appellants are not entitled to use the suit cart track to other survey fields except S.F.Nos.224, 225 and 226A, overlooking that the appellants are using the suit cart track to reach their shares in S.F.Nos.224, 225 and 226A and thereafter they go to other survey fields without touching the suit cart track?

12. Based on the submissions made, the only point that has arisen for consideration, is as to whether the appellants can use the suit cart track marked in Ex.A-6, dated 12.12.1930, to have access not only to S.Nos.224, 225 and 226/A, but also to have access to other properties belonging to the appellants.

13. In Subbiah Goundan Vs. Ramaswamy Goundan and others (AIR 1973 (Madras) 42 [V60 C12]), this Court, while deciding the rights of the co-owners, under Section 18 of the Easement Act, 1882, wherein the defendants wanted to use the common channel for taking water to irrigate their fields from their exclusively owned well and the plaintiff sued for injunction to prevent the defendants from making such use, had held thus:

"Each of the co-owners of the common property is entitled to use the property in the way most advantageous and beneficial to him without at the same time causing any injury or detriment to the other co-owners. It is not for the other co-owners to dictate in what manner the other co-owner should enjoy the common property so long as the user of the common property by one co-owner does not materially interfere with the use of the property by the other co-owners or affect their rights or in any way weakens, damage or injure the common property. Therefore, when plaintiff neither alleged nor proved that by the use of the

common channel by the defendants to take water from their exclusive well they were in any way prejudiced the plaintiff was not entitled to prevent the defendants from using the common channel in the way most beneficial to them during their turn of enjoyment."

14. In Krishnammal Vs. Periasamy (1997) 1 MLJ 309) this Court had quoted with approval the passage from Mitra's 'Joint Property and Partition' - Tagore Law Lectures, Third Edition 1991, at page 254, which is as follows:

"It is not permissible for a co-owner of co-sharer to change the mode of user of a common passage without the consent of the other co-sharers. As between the co-sharers of a common passage each has the right to lay underground drains. In such a case there is no question of common passage being a servient tenement in respect of any of the promises of the co-owners. Every co-owner has the right to make full use of the common passage. Even though a co-owner has the right to lay a new underground drains in the common passage, but such laying of new drains should not interfere with the existing drains and with the right of other co-owners of the passage. A person's right to drain his own premises by laying underground pipes in his own land is an incident of legal ownership and is not easement. The question of tenement arises when two tenements are involved, the dominant tenement which the right belongs and the servient tenement on which the obligation is imposed. Such a situation does not arise between co-owners of common passage having right of drainage through it. When a right of drainage is given to the co-owners by deed of partition to the erstwhile co-owners, it is a right to drain the house and premises specified therein and is a joint right of drainage by the underground process. Moreover, such right is not restricted only to the building existing at the time of partition and the co-sharers have got the right to lay new underground drain during the common passage for the new buildings which may be erected on the premises provided there is no restriction in the deed of partition against construction of a new building. So, it is, therefore, clear that when a common passage belongs to both the plaintiff and the defendant, there is no question of any one party having an easement right over the same. It is a joint property and any co-owner has to use such property reasonably in the sense that his user does not amount to ouster of other co-owners. No co-owner can complain that the use of

the common passage by the other causes an unnecessary or additional burden upon the common passage. A co-owner carrying his carts, bullocks and ploughs through the joint property cannot be said to have caused unnecessary inconvenience to the other co-owner".

15. In Basha Reddiar (died) and 4 others Vs. Janarthanam and 5 others (1998-3-L.W. 1977) this Court, while dealing with the right of a co-owner to use the land to the maximum benefit, held as follows:

"The finding of the Courts below that the plaintiff is not entitled to have the underground drainage over the common pathway cannot be accepted. As a co-owner, he is entitled to make use of the land to the maximum benefit, subject to only one condition, i.e. his enjoyment should not affect the right of others. To take an underground drainage connection is a right of enjoyment by a co-owner and the other co-owners cannot injunct the plaintiff on the ground that he interferes with their co-ownership rights. If such a relief is granted, it will amount to negating the right of the co-owner to enjoy his co-ownership right. By laying the underground pipeline, there is no interference of the passage or their access to their buildings or their property, except for some minor inconvenience during the time of laying the pipeline. The defendants will not be put to any hardship or injury to their co-ownership rights."

"When it is admitted that the plaintiff as well as the defendants are the joint-owners, the plaintiff cannot say that he is holding an easement right, in which he is claiming ownership also. The claim is inconsistent. The claim of the appellant that he has got an easement right to take the underground drainage is not correct. But, that by itself will not show that the appellant is not entitled to any relief. Over the passage, the plaintiff and the defendants are the owners."

16. Based on the above decisions, the learned counsel, Mr.A.K.Kumarasamy, appearing for the appellants, had contended that the suit cart track pathway is in S.Nos.226-A, which had been allotted to the appellants according to the partition deed marked as Ex.A-6. In such circumstances, the plaintiffs could claim only an easementary right in the suit cart track pathway. However, if the suit cart track pathway can be taken to be a common cart track pathway to be used by the plaintiffs and the defendants, in such a case, the plaintiffs cannot claim exclusive right of use of the said cart track pathway. It is further contended that the suit cart track pathway could be used

by the appellants not only to have access to the properties, which were available to them under the partition deed, dated 12.12.1930, marked as Ex.A-6, but also to the other properties purchased by them subsequently.

17. The main contention raised by the learned counsel Mr.T.Murugamanickam, appearing on behalf of the respondents, is that the wordings in Ex.A-6, dated 12.12.1930, had to be construed and interpreted using the principle of 'ejusdem generis'. Accordingly, Ex.A-6 makes it clear that only those who have been mentioned in the partition deed, dated 12.12.1930, and such similarly placed persons could use the suit cart track pathway and that too only to have access to the survey numbers mentioned in the said document.

18. Based on the contentions raised on behalf of the parties concerned and on analysing the records available before this Court, this Court is of the considered view that the suit cart track pathway is meant to be used according to the partition deed, dated 12.12.1930, marked as Ex.A-6, by both the plaintiffs and the defendants in common. According to the principle laid down in the decisions relied on by the learned counsel appearing for the appellants, it is clear that the suit cart track pathway can be used in common by both the appellants and the defendants and their men to their maximum beneficial use, without causing any hindrance, or interference, or prejudice to the other users. Thus, the defendants also have the right to use the suit cart track pathway, not only to have access to S.Nos.224, 225 and 226/A but also to the other properties purchased by them subsequently.

19. In such circumstances, the judgment and decree of the Sub Court, Bhavani, dated 26.03.1996, made in A.S.No.7 of 1996 is set aside confirming the judgment and decree of the District Munsif Court, Bhavani, made in O.S.No.82 of 1985. Accordingly, the second appeal stands allowed. No costs.
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Sd/-

Assistant Registrar

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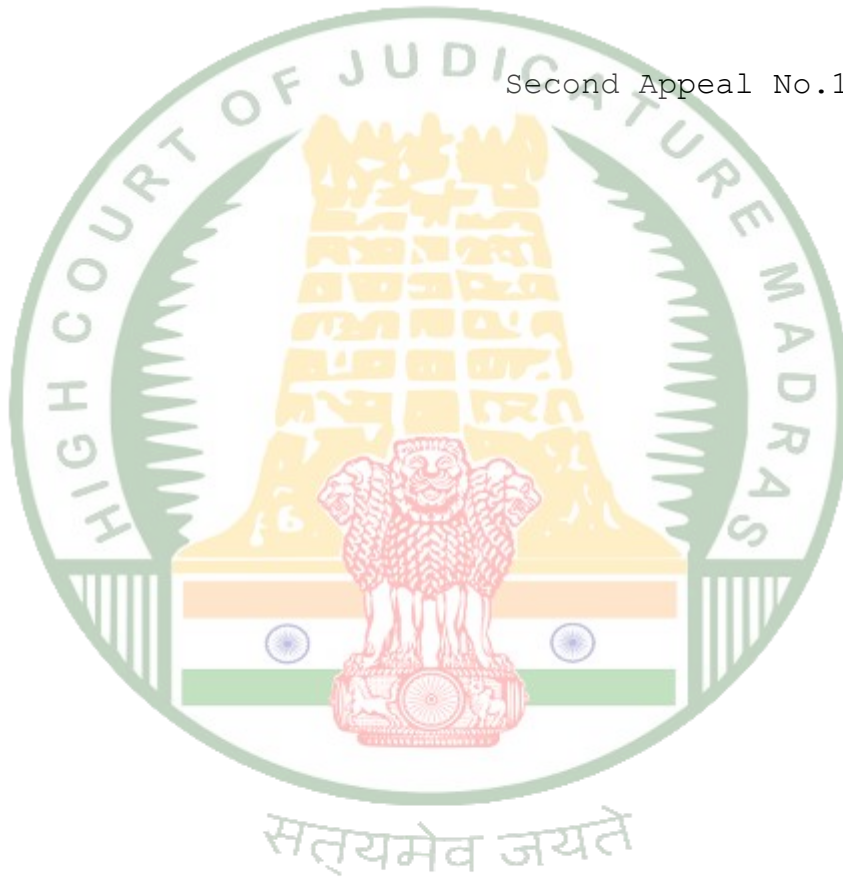
To

- 1.The Subordinate Judge, Bhavani
- 2.The District Munsif court, Bhavani
- 3.The Section Officer, VR Section, High court, Madras

- one cc to Mr. A.K.Kumaraswamy, Advocate sr no. 35275
- one cc to Mr. T. Murugamanickam, Advocate sr no. 35133

vrk(co)
nm(30.07.07)

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